

Review

Rape trauma syndrome – Time to open the floodgates?

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Abstract

The conviction rate in rape cases remains remarkably low, leading many to believe a new approach is needed to prosecuting such crimes. Many important steps have been taken in relation to the collection and retention of evidence and the setting up of specialist rape prosecutors, but important evidential weaknesses remain present in the system alongside Victorian attitudes to sexual conduct. The British Home Office is currently consulting on a number of measures, including the admissibility of evidence showing the presence of rape trauma syndrome. This paper examines the history of this controversial evidential debate.

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1. Supporting rape victims

The Home Office in its consultation paper “Convicting Rapists and Protecting Victims – Justice for Victims of Rape”,¹ reminds us all of the low level of conviction in rape cases (less than 6% of all cases reported to the police). This paper examines one aspect of expert evidence, namely rape trauma syndrome, reaching the conclusion that the time is ripe to bring this expertise to the assistance of jurors grappling with the almost impossible task of assessing truth in the absence of corroborative evidence.

2. Rape trauma syndrome

Rape trauma syndrome was identified in the 1970s by two Americans (one a nurse, the other a sociologist),² and is a potentially powerful tool in the prosecutor’s armoury, given that a significant number of rape victims suffer it as a consequence of the attack (figures vary but are between 31% and 78%).³ If the medicine surrounding rape trauma syndrome is correct, and it remains a matter of debate, the admissibility of such evidence would potentially provide a valuable tool for juries in assessing the

credibility of the rape complainant. The evidence of rape trauma syndrome would go some way toward explaining delay in reporting of crime (a common feature in rape cases), and provide strong if not conclusive evidence that intercourse was non-consensual. In this paper I examine what rape trauma syndrome is, whether it is admissible in law in England and Wales, its limitations and controversial history and whether it ought to be used in our jurisdiction.

3. Rape trauma syndrome – a definition

Rape trauma syndrome is essentially a recognised form of post traumatic stress disorder⁴ and is ‘the stress response pattern of the victim following forced, non-consenting sexual activity’.⁵ A person (male or female) suffering from rape trauma syndrome will display particular characteristics that can be observed by a doctor and checked against the recognised symptoms of rape trauma syndrome. Symptoms of rape trauma syndrome include: recurrent and intrusive recollections of the rape, nightmares, numbing of general responses, feelings of detachment and estrangement, difficulty sleeping, outbursts of anger and exaggerated startled response.

Rape trauma syndrome, if it is to occur in a victim at all, does not have an immediate onset following the trauma suffered.

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Rape trauma syndrome is rarely mentioned outside of academic texts on sexual offending, and it has been said that evidence of rape trauma has not been admitted in this country to assist in establishing lack of consent.⁶

3.1. *Essential characteristics of rape trauma syndrome*

Rape trauma syndrome is diagnosed by testing and analysis of stress responses. For rape trauma syndrome to be confirmed four criteria must be present:⁷

- (1) The event that causes the stress must be of significant magnitude to evoke distinguishable symptoms in almost everyone.
- (2) The trauma must be re-experienced (i.e. flashbacks).
- (3) Reduced involvement with the environment around the victim, or numbing of responsiveness to the environment (e.g. withdrawal).
- (4) Two of the following six symptoms, present for at least one month, should be present that were not present before the rape: (a) exaggerated, startle response of hyper-alertness; (b) disturbance in sleep patterns; (c) impairment of memory and/or power of concentration; (d) avoidance of activities that arouse recollection; (e) increased symptoms that symbolize or resemble the event; and (f) guilt about surviving or about behaviour during rape.

Post traumatic stress disorder, of which rape trauma syndrome is one sub-category, is universally recognised as a medical disorder, and there is therefore no reason why this evidence should not be seen as being medically sound and therefore potentially admissible. It is important though to establish the legal basis on which evidence of this kind can be placed before a jury.

3.2. *Admissibility of psychiatric evidence*

There has been a general reluctance to admit psychiatric evidence in criminal cases, as it is often not at all probative of the issues to be decided by the jury. In rape cases the depositions almost always disclose evidence of a complainant's distress after the incident complained of, and prosecutors will seek to have it admitted. The evidence of itself lends little if any weight to the allegation however, and juries will be advised of this, the argument being that the evidence lacks independence and the ability to directly implicate the accused.⁸ Consideration of the admissibility of such evidence was considered in relation to corroboration, a requirement that has been abolished in relation to almost every single criminal offence.⁹ In limited circumstances distress that has been observed in circumstances where the complainant would not know that she was being observed, and very shortly after the incident itself has been held to be admissible.¹⁰ Given that rape trauma syndrome is very much about the complainant's distress after the incident, it raises the question of whether or not such evidence is admissible.

Admissibility is primarily secured in rape trauma syndrome cases, due to the fact that the trauma observed is capable of being assessed by trained professionals, who would be capable of detecting any attempt to describe symptoms that were in fact false, in order to shore up a complaint of rape. This important protection adds a degree of security to the admissibility of this type of evidence, which cannot be delivered in relation to general evidence of distress. It is important to note that evidence of rape trauma goes substantially beyond being a toll merely to "oath help". Accordingly, whereas evidence of demeanour after the offence would not necessarily be admissible to support the veracity of the complainant's account,¹¹ there appears to be no good reason to suppose that the courts would exclude evidence of rape trauma syndrome. In *Regina v Keast* (1998) Crim LR 748, evidence of the complainants cowed demeanour and incontinence was held not to be probative of any issue in the case as there was no 'concrete' basis for regarding the demeanour and state of mind as confirming or disproving sexual abuse. It is clear that the symptoms described in that case would not satisfy the essential elements of rape trauma syndrome.

3.3. *Is rape trauma syndrome reliable?*

Generally speaking rape trauma syndrome is recognised as having a sound basis in psychiatric medicine. However, it is not without its critics. There is evidence to suggest that rape trauma syndrome can manifest itself in women who have been subjected to an attempted rape (but not the full act), and in women who do not consent but do not communicate that lack of consent, nor necessarily display any behaviour which would (or should) make a man aware that she is not consenting¹² – this is of crucial importance in relation to consent, as in such a scenario a rape would not have actually occurred, yet the evidence of rape trauma syndrome, if accepted by the jury may well leave them with no realistic option but to convict.

Given these inherent dangers it is at least arguable that such evidence should not be admissible, but this would result in other contentious theories not being admissible also. It is rare that there is a complete consensus of scientific opinion in relation to a particular issue, and in such cases it is for the jury to assess the competing theories and any other evidence in the case. I would argue that if the medical science at issue is subject to widespread criticism there may be an argument for staying the admissibility of evidence in cases until such time as the debate has been concluded one way or another (this may of course deny the prosecution from using proper evidence in some cases).

3.4. *Does evidence of rape trauma syndrome usurp the jury's function?*

Given that the implicit nature of rape trauma syndrome is a non-consensual attack, there is a real danger that once this evidence is introduced it effectively renders a convic-

tion inevitable. It would however be something of an irony if particularly powerful evidence were to be excluded on that basis; nor is it certain that a jury will blindly accept expert evidence – a defendant can sometimes convince a jury, despite strong incriminating evidence and an explanation amounting to little more than “I do not know”, that he is in fact innocent. Essentially, evidence of rape trauma syndrome is no different from, say, evidence of DNA, which very often these days results in probability ratios expressed in billions as opposed to thousands only a few years ago. In that case, there is no reason to suppose any special caution is required or specific direction to the jury. In the United States, where evidence of rape trauma syndrome has been used in many (but not all) States for a number of years, some courts have adopted a practice of not allowing the syndrome to be referred to by name.¹³ In this case the court stated that ‘...avoiding the terminology is more than cosmetic. The concern with unfair prejudice is largely reduced when the terminology does not equate the syndrome conclusively with rape.’¹⁴

In cases where evidence of rape trauma syndrome is permitted, it is important to stress its limitations, which can be expressed as:

- (1) Other trauma can bring on the same symptoms (if however a jury were satisfied that the only significant trauma had been the alleged rape, the conclusion would be inevitable).
- (2) The trauma must be significant.
- (3) Rape trauma syndrome is not a “scientific test” for assessing whether there was consent or not.
- (4) A jury would still have to assess the weight to be given to the victim’s and the doctor’s evidence.

Taking all of the above in to account, I would argue that evidence of rape trauma syndrome is potentially powerful evidence in the hands of the prosecution, providing powerful evidence to support the complainant’s assertion that a traumatic incident of trauma (e.g. a rape) had in fact taken place. One needs to consider though (and this is dealt with below) whether the defence are able to use the lack of rape trauma to support a defence of consensual intercourse.

3.5. Potential pitfalls of using evidence of rape trauma syndrome – loss of the rape shield

For many years women were systematically cross-examined about their sexual history in an attempt by the defence to discredit their character. Defence lawyers played to common stereotypes in order to secure acquittals, and it was widely believed (and perhaps still is) that women who dress in a certain way, or invite men back for “coffee” are in effect ‘asking for sex’. If the answer to that question was ‘yes’ it followed for some that the intercourse that followed must inevitably have been consensual. Such ignorant attitudes are only slowly being broken down, and Parliament has attempted to limit the cross-examination of complainants

in relation to their previous sexual experiences, by enacting the Youth Justice and Criminal Evidence Act 1999.

Section 41 of that Act introduces a “rape shield” for complainants, in an attempt to focus cross-examination on relevant issues only, and try and prevent the defence from utilising what may still be certain prejudices (ones that have no foundation in logic however). Section 41 provides that:

- (1) As a general rule no question may be asked about previous sexual behaviour.
- (2) Leave can be granted if the issue to which the evidence relates is not one of consent and refusing to admit it would render the conviction unsafe.
- (3) Leave can be granted if it does relate to an issue of consent and it is in relation to previous conduct at or about the same time as the incident in question (i.e. evidence about what led up to the incident); or
- (4) The sexual behaviour bore similarity to the incident complained of.

The Act was intended to provide a straight-jacket approach to the admissibility of such evidence, but decisions of the appellate courts in *Regina v A* (No 2) [2002] 1 AC 45 and *Regina v R.T. and M.H* [2002] 1 WLR 632, CA have watered the provisions down somewhat.¹⁵

Section 41 is relevant to a discussion in relation to the admissibility of rape trauma evidence, as to introduce rape trauma requires an exploration, in many cases of previous sexual history. The defence are able to explore other possibilities for the presence of rape trauma, such as: previous rape or attempted rape (or other sexual assault). Other traumatic incidents such as abortion could also be responsible for rape trauma syndrome and it is therefore inevitable that this may be explored in certain cases. Further, rape trauma may manifest itself in predictable ways, leading to frigidity, something a defence lawyer may want to explore to test whether rape trauma syndrome is present.

The importance of highlighting this concern is that the high attrition rate in rape cases may be partly due to many women’s reluctance to give evidence if their private and intimate life story is going to be aired in a public courtroom. There is therefore a heavy price to be paid (by the woman) for the introduction of this evidence.

3.6. Defence use of rape trauma syndrome

If a severely traumatic incident is likely in many cases to bring on symptoms of rape trauma syndrome, can it be supposed that a supposed victim without such symptoms is not a victim at all? Given that studies indicate that not all victims will suffer from rape trauma syndrome the more obvious answer to that question must be no. But this is not the position in the United States, where evidence of absence of rape trauma syndrome has been held to be admissible at the behest of the defence.

In *Henson v State*¹⁶ the complainant was allegedly the victim of what could only be described as a brutal assault at knifepoint, culminating, she said, in rape. The defence sought to introduce evidence of the opinion of a doctor as to whether the complainant would have exhibited certain behaviour had she been through the attack that she alleged. At first instance the court refused to allow the defence to introduce the evidence, but on appeal it was allowed. The court, on appeal, held that the evidence was indeed relevant as it "...tended to prove that (the complainant's) behaviour after the incident was inconsistent with that of a victim who had suffered a traumatic rape such as that which (she) recounted."¹⁷

It is likely that if evidence of rape trauma syndrome comes to be used by the prosecution in England and Wales, so too will attempts be made by the defence to introduce this type of evidence. The danger of this approach is that it opens the complainant up to detailed cross-examination in relation to her medical and psychiatric history, a step that may further set back attempts to persuade victim's that they can be protected from irrelevant and intrusive lines of enquiry.

4. Conclusion

Given the appallingly low level of conviction in rape cases desperate and unusual measures are needed. Until the experts, and most probably the appellate courts, are allowed to examine the issues in detail, there is a substan-

tial risk that justice is being denied, annually, to many thousands of women.

References

1. <http://www.homeoffice.gov.uk/documents/cons-290306-justice-rape-victims?view=Binary>.
2. Hackman J. *Henson v State: Rape trauma syndrome used by the defendant as well as the Victim*, 19 *Am J Trial Advoc* 453, at 454.
3. Pittman Roger K, Orr Scott O. Psychophysiologic testing for post-traumatic stress disorder. 21 *Bull Am Acad Psychiatry & L* 1993;37: 39.
4. Some doctors dispute this classification, a debate beyond the scope of this paper but nonetheless recognised.
5. Burgess AW. Rape trauma syndrom. 1 *Behav Sci & L* 1983;97:109.
6. Temkin J. Rape and the legal process, 2nd edition. p. 3.
7. Feagan C. Rape trauma syndrome testimony as scientific evidence: evolving beyond *State v Taylor*, 61 *UMKC L Rev* 145, 151–52.
8. *Regina v Knight*. 1 *WLR* 230; 1966.
9. Exceeding the speed limit remains one of the offences where corroboration is still required.
10. *Regina v Redpath*. 46 *Cr App R* 319 (CA); 1962.
11. *Regina v Keast*. 1998 *Crim LR* 748, CA. Some behaviour might be considered part of the *res gestae* and admissible in any event, see *Regina v Townsend*, unreported, CA 23 October 2003.
12. Stefan, S. The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling 2nd Law. *Northwestern University Law Review* 88, 1271–1345 (op cit. p. 1327).
13. *State v Allewalt* 308 MD 89. p. 741.
14. *State v Allewalt* 308 MD 89. p. 751.
15. There is no discussion of the wider problems in section 41 as this is outside the scope of this paper.
16. *Henson v State*, 535 N.E. 2d 1189 (Ind. 1989).
17. *Henson*, 535 N.E. 2d 1189. p. 1191.